Supreme Court, U.S.
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No. 97-1060

In the Supreme Court of the United States

OCTOBER TERM, 1997

MITCHELL & NEELEY, INC., PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Labor satisfied procedural due process requirements when it identified petitioner as the coal mine operator liable for two claims for benefits under the Black Lung Benefits Act.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 127 F.3d 39 (Table). The decisions of the Benefits Review Board (Pet. App. B1-B10) and the administrative law judge (Pet. App. C1-C14) awarding benefits are unreported. Previous decisions of the Benefits Review Board (App., *infra*, 1a-11a) and the administrative law judge (Pet. App. D1-D31) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1997. The petition for a writ of certiorari was filed on December 22, 1997 (a Monday). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (BLBA or Act), 30 U.S.C. 901 *et seq.*, provides for the payment of benefits to coal miners who are totally disabled by pneumoconiosis and to eligible survivors of certain deceased miners. 30 U.S.C. 901(a), 922(a), 932(c). Mine operators are generally responsible for paying such benefits, and in cases in which a miner worked for more than one operator, the Secretary of Labor has determined that full liability should generally rest on the operator with whom the miner had the most recent periods of cumulative employment of not less than one year. 30 U.S.C. 932(b); 20 C.F.R. 725.493(a)(1); see also 30 U.S.C. 932(h) (authorizing Secretary to apportion liability among operators). When the Secretary of Labor determines that there is no operator who may be held liable for the benefits, the Black Lung Disability Trust Fund pays benefits. 26 U.S.C. 9501(d)(1)(B). The Secretary, through the Department's Office of Workers' Compensation Programs (OWCP), is a party to all black-lung benefit claims. 30 U.S.C. 932(k); 20 C.F.R. 701.202(f), 725.360(a)(5).

Claims for benefits under the BLBA generally follow the adjudicatory framework established under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* See 30 U.S.C. 932(a) (incorporating, *inter alia*, 33 U.S.C. 919 and 921, "except as otherwise provided in this subsection or by regulations of the Secretary" of Labor). Thus, a district director (formerly deputy commissioner) in OWCP receives a claim, gathers relevant evidence,

and makes an initial determination on eligibility. 20 C.F.R. 701.301(a)(7), 725.351(a), 725.401-725.411; see 33 U.S.C. 919(a) and (c). The district director may identify an operator as responsible for the benefits at any time during the processing of the claim, once sufficient evidence becomes available. 20 C.F.R. 725.412(a). The district director notifies the operator in writing of its designation and sends the operator the documentary evidence and initial findings on eligibility. 20 C.F.R. 725.412(b). In some circumstances, an operator may receive notice of its possible liability after the adjudication of benefits on a claim, in which case it is given the opportunity to respond. 20 C.F.R. 725.412(c). If there is a dispute between two or more operators as to which may be liable for a claim, all such operators receive notice and the liability issue is determined. 20 C.F.R. 725.412(d).

If a dispute develops between the identified responsible operator and the claimant, the claim is forwarded to an administrative law judge (ALJ) for a hearing and decision. 20 C.F.R. 725.421(a), 725.450, 725.476-725.477; see 33 U.S.C. 919(d). The ALJ's decisions are reviewable by the Benefits Review Board (Board), and the Board's decisions are subject to review in the courts of appeals. 20 C.F.R. 725.479-725.482; see 33 U.S.C. 921.

2. From January 1, 1964, through November 2, 1970, James Gamble worked for petitioner as a truck driver at a strip mine. Pet. App. D9. In 1973, Gamble began work for a coal mine construction company, Cowin and Company. In 1974, while working for Cowin, Gamble filed a claim for black lung benefits. *Id.* at D3, D9. In December 1976, Gamble retired from Cowin. *Id.* at D9. At that time, the BLBA defined

"miner" as "any individual who is or was employed in a coal mine." 30 U.S.C. 902(d) (1976).

In 1978, while Gamble's claim was pending, Congress amended the Act's definition of "miner" to include "an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(b), 92 Stat. 95. In April 1979, the Department of Labor, which was required to review pending claims under the standards of the Act as amended, see 30 U.S.C. 945(b), notified Cowin that it was the operator responsible for paying Gamble's benefits. Pet. App. D3; see 20 C.F.R. 725.493(a)(1) (responsible operator is generally the one with whom the miner had the most recent cumulative period of coal mine employment of not less than one year).

Cowin disputed its designation as responsible operator, and in February 1983, an ALJ dismissed Cowin and remanded the case to OWCP. Pet. App. D3-D4. The Director, OWCP, appealed that dismissal to the Benefits Review Board, and in 1986 the Board remanded the case to the ALJ because the ALJ had used an improper legal standard. *Id.* at D4-D5. On remand, the ALJ again dismissed Cowin, reasoning that, although Gamble had worked for Cowin for four years, only four months of that time involved coal mine employment as the BLBA defines it. *Id.* at D5-D6; App., *infra*, 4a. The ALJ did not rule on the merits of Gamble's claim, but instead remanded the case to OWCP for further consideration. *Ibid.*

3. In September 1982, while Cowin was litigating its designation as responsible operator, Mr. Gamble died. Pet. App. D4. In May 1983, his widow, respon-

dent Mary Gamble, filed a separate claim for survivor's benefits under the BLBA. On May 20, 1983, OWCP notified petitioner that it was the operator responsible for both the miner's claim and the survivor's claim. *Id.* at D4-D5; App., *infra*, 3a. Neither claim was adjudicated, however, until after Cowin had been dismissed from the proceedings. See Pet. App. D4-D6. After Cowin's dismissal, petitioner formally controverted both claims and requested an ALJ hearing, arguing that it was not the responsible operator, and that neither claimant was eligible for benefits. *Id.* at D6-D8.

4. In April 1989, a new ALJ issued a decision awarding both miner's benefits and survivor's benefits against the Black Lung Disability Trust Fund. Pet. App. D1-D29. The ALJ recognized that, after Cowin's dismissal, petitioner was the responsible operator under 20 C.F.R. 725.493(a)(1)—*i.e.*, the operator with whom Mr. Gamble most recently worked for at least a year in coal mine employment, as defined under the Act. Pet. App. D9-D10. Nonetheless, the ALJ concluded that OWCP was not entitled to a second opportunity to name a responsible operator on the miner's claim, under the Board's decision in *Crabtree* v. *Bethlehem Steel Corp.*, 7 Black Lung Rep. (MB) 1-354 (1984). Pet. App. D10-D11. The ALJ read *Crabtree* to require the Department of Labor to "resolve the responsible operator issue in a preliminary proceeding and/or proceed against all putative responsible operators at every stage of the adjudication in order to promote both due process of law and efficient administration of the Act." *Id.* at D10. Thus, because, under the ALJ's reading of *Crabtree*, OWCP had exhausted its opportunity to name an operator to pay the miner's claim for benefits, and did

not dispute the miner's eligibility, the Black Lung Disability Trust Fund was required to pay the miner's claim. *Id.* at D13.

The ALJ recognized that petitioner was properly designated as the responsible operator on the survivor's claim, and adjudicated that claim under the law governing claims filed after January 1, 1982. Pet. App. D13-D14. Applying that law, the ALJ denied respondent Mary Gamble's claim against petitioner because she had not established that her husband's death was due to pneumoconiosis. *Id.* at D14-D28. The ALJ then awarded benefits on the survivor's claim against the Trust Fund, based on the Fund's liability for the miner's claim. *Id.* at D28-D29.[1]

5. In March 1993, the Benefits Review Board reversed the awards against the Trust Fund. App., *infra*, 1a-11a. The Board reasoned that *Crabtree*'s concerns with piecemeal litigation were not present here because petitioner was named as a responsible operator before any formal hearing on the merits of the claims. *Id.* at 8a. The Board also concluded that petitioner "received its procedural due process rights to present evidence, develop its own case and confront and cross-examine the evidence presented on behalf of the miner's claim." *Ibid.* The Board remanded the case to the ALJ to give petitioner a chance to defend against the miner's claim, which the ALJ had not adjudicated because the Director had not contested the miner's eligibility. *Id.* at 9a-10a. And, the Board

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[1] The BLBA provides that if, as here, a miner files a claim before January 1, 1982 and is found to be totally disabled due to pneumoconiosis, his survivor is automatically entitled to benefits without having to prove that he died from pneumoconiosis. See 30 U.S.C. 922(a)(2), 932(*l*); 20 C.F.R. 725.212(a).

noted, if entitlement is established on the miner's claim, then Mrs. Gamble would be derivatively entitled to survivor's benefits from petitioner as well. *Id.* at 10a.

6. On remand, a third ALJ awarded benefits against petitioner. Pet. App. C1-C14. Because the miner's claim was filed in 1974 and was subject to the 1978 BLBA amendments, the ALJ considered the claim under regulations applicable to claims filed before April 1, 1980. See *id.* at C3-C4 (referring to regulations under 20 C.F.R. Pt. 727); *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 137 (1987). Those regulations presume that a miner with a certain amount of coal mine employment is totally disabled by pneumoconiosis and therefore entitled to benefits if the miner establishes the existence of pneumoconiosis by x-ray, biopsy, or autopsy, or the existence of a severe respiratory impairment through specified types of evidence. 20 C.F.R. 727.203(a)(1)-(4). To rebut the presumption, an operator must establish that the miner is doing or able to do his usual coal mine work or comparable work; that the miner's disability "did not arise in whole or in part" from coal mine employment; or that the miner did not have pneumoconiosis. *Id.* § 727.203(b)(1)-(4).

Considering evidence developed in petitioner's earlier defense of the miner's and survivor's claims, the ALJ found that the miner invoked the regulatory presumption based largely on x-ray evidence establishing pneumoconiosis and pulmonary function tests establishing a respiratory impairment. Pet. App. C4-C9; see 20 C.F.R. 727.203(a)(1) and (2). The ALJ also found that petitioner failed to rebut the presumption because (1) the miner was no longer working; (2) the x-ray evidence established pneumoconiosis; (3) the

medical opinions did not specifically address the miner's ability to work; and (4) although the medical evidence suggested that the primary cause of the miner's total disability was cigarette abuse, petitioner failed to establish that pneumoconiosis was not at least a contributing cause of such disability. Pet. App. C9-C10. Based on the award of benefits to the miner, the ALJ awarded benefits to respondent Mary Gamble on her survivor's claim. *Id.* at C11; see note 1, *supra*.

7. The Board affirmed the awards of benefits against petitioner. Pet. App. B1-B10. The Board initially noted that petitioner did not challenge the ALJ's findings that the miner invoked the presumption of eligibility by establishing a respiratory impairment, and that petitioner had failed to rebut the presumption by establishing that the miner was either working or able to work. *Id.* at B4 n.2. The Board also adhered to its earlier decision rejecting petitioner's arguments that *Crabtree* applied because petitioner had not established that the Board's decision was clearly erroneous or contrary to a subsequent decision of a controlling authority. *Id.* at B5-B6. On the merits, the Board rejected petitioner's arguments that the ALJ erred by discounting medical opinions that, in petitioner's view, established that Mr. Gamble did not have pneumoconiosis and that his pulmonary disease was due to smoking. *Id.* at B6-B8.

8. The court of appeals affirmed the Benefits Review Board's decision in an unpublished summary order. Pet. App. A1-A2.

ARGUMENT

The court of appeals' summary decision affirming the Benefits Review Board's disposition of this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 6-10) that it was deprived of due process because the Director of the Office of Workers' Compensation (OWCP) did not notify it of its potential responsibility to pay benefits arising out of James Gamble's pneumoconiosis until after Gamble had died. Petitioner argues that the government has a vested interest in shifting liability for benefits away from the Black Lung Disability Trust Fund to operators, and so, "[t]o the extent that the notice to the operator can be delayed until [the government's] obligation to gather evidence has been completed, the Director gains an adversarial advantage over the operator." Pet. 7. That contention is without merit.

Petitioner's argument rests on the assertion (Pet. 7-8) that it was unable to examine the autopsy slides that underlay the ALJ's determination that Gamble suffered from pneumoconiosis (Pet. App. C5). Petitioner fails to indicate, however, why or how its own medical experts were unable to obtain access to those slides, or whether it made efforts to review those slides. Thus, it has not shown that its interests were adversely affected by any delayed notification in this case. Furthermore, the ALJ found Gamble presumptively entitled to benefits based not only on the autopsy evidence, but also on x-ray evidence establishing pneumoconiosis and on pulmonary function tests establishing a respiratory impairment. *Id.* at

C4-C9. Because pulmonary function tests provide an alternative method for invoking the presumption that a miner has suffered from pneumoconiosis, see 20 C.F.R. 727.203(a)(2), and because petitioner did not challenge the ALJ's finding that the pulmonary function evidence was sufficient for invocation of the presumption, see Pet. App. B4 n.2, B7, petitioner's complaint about the ALJ's reliance on the autopsy tests falls wide of the mark.

Petitioner also overlooks the fact that OWCP's initial findings are not binding, or even considered, in claims adjudication once a party obtains an ALJ hearing. See 20 C.F.R. 725.455(a). Moreover, the Director has significant incentives to give adequate and timely notice to an operator of its potential liability, rather than delay such notice, as petitioner argues. Under 26 U.S.C. 9501(d)(1)(A), the Trust Fund is required to pay benefits based on OWCP's initial determination of eligibility, even in cases where an operator is ultimately found to be responsible for the benefits.[2] And if the Board or a court were to dismiss an operator on the ground that OWCP had delayed notification in a way that violated the operator's due process rights, the Trust Fund would be left responsible for paying benefits.

2. Petitioner also argues (Pet. 10-13) that the Fourth and Sixth Circuits have reached conflicting decisions concerning the Department of Labor's obligations to notify an operator of its potential responsibility for paying a claim for black lung benefits. Whatever conflict may exist between those two

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[2] We are informed that Mrs. Gamble in fact received approximately $51,000 in benefits from the Trust Fund before petitioner was found to be the responsible operator.

circuits, however, has no implication for this case, which arises in the Eleventh Circuit; that court summarily affirmed the Benefits Review Board in this case without any discussion of the due process principles.

Furthermore, the asserted conflict does not exist. The Fourth Circuit has held that, when a claimant has established eligibility for benefits against an operator who is later determined not to be responsible for paying them, and the Director has had a full opportunity to ascertain the responsible operator as a preliminary matter, the Director may not have a second chance to identify a responsible operator. *Director, OWCP* v. *Trace Fork Coal Co.*, 67 F.3d 503, 508 (4th Cir. 1995). The Sixth Circuit has held that, when a claimant has *not* yet established eligibility for benefits, but an operator has argued that it is not the responsible operator under the Act, then the Director may have another opportunity to identify the properly responsible operator. See *Director, OWCP* v. *Oglebay Norton Co.*, 877 F.2d 1300, 1303 (6th Cir. 1989) (noting that, when second operator was identified, "the claim had not, at that time, been finally adjudicated").

The instant case is consistent with both of those decisions. As in *Oglebay*, the claims at issue here had not been adjudicated when petitioner was identified as a responsible operator. The Fourth Circuit's agreement with the concerns expressed in the Board's decision in *Crabtree*, *supra*, and its "unwilling[ness] to potentially upset the finding that [the claimant] is entitled to benefits" (such that liability is imposed on the Trust Fund), see *Trace Fork Coal*, 67 F.3d at 508, are therefore not implicated in this case. See also App., *infra*, 6a (Board's concerns in *Crabtree* are not

present because petitioner was named a responsible operator before any formal hearing on the merits of Gamble's claim).[3] Case law controlling in the Eleventh Circuit, moreover, recognizes the well established due process principle that, before an operator is liable for paying black lung benefit claims, it "must first be given reasonable notice of the opposing claims and an opportunity to refute them." *U.S. Pipe & Foundry Co.* v. *Webb*, 595 F.2d 264, 274 (5th Cir. 1979).[4] But that decision also concluded that the Department of Labor's procedures give operators adequate opportunity to respond to benefit claims, even after the miner has died. See *id.* at 275; see also *Midland Coal Co.* v. *Director, OWCP*, 120 F.3d 64, 66 (7th Cir. 1997) (holding that "the Department of Labor was not required to notify [the operator] until after the initial determination of eligibility"). Petitioner's alleged conflict amounts to nothing more than a disagreement with the way the court of appeals applied established legal principles to the facts of this case.

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[2] Petitioner also asserts that the Director has proffered no explanation for failing to notify petitioner of its potential liability in a "timely" manner. Pet. 11. OWCP did not notify petitioner until 1983 because it had reasonably determined that, in light of the 1978 BLBA amendments, Cowin and Company was the responsible operator. See pp. 4-5, *supra*. Nor do the Department's regulations require immediate notification of all potentially liable operators, as petitioner suggests. See Pet. 8-9; *Oglebay*, 877 F.2d at 1302-1305.

[3] Under *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), decisions of the Fifth Circuit issued before October 1, 1981, are binding precedent in the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1998

APPENDIX

U.S. Department of Labor [agency seal omitted]

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 89-1654 BLA
OWCP No. 419-16-2738

MARY GAMBLE
(WIDOW OF JAMES W. GAMBLE),
CLAIMANT-RESPONDENT

v.

MITCHELL & NEELEY, INCORPORATED,
EMPLOYER-RESPONDENT

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

DATE ISSUED: MAR 1993

DECISION AND ORDER

Appeal of the Decision and Order of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

M. Clay Ragsdale, IV (Starnes & Atchison), Birmingham, Alabama, for employer.

Jeffrey S. Goldberg (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (Director), appeals the Decision and Order (88-BLA-2308) of Administrative Law Judge A. A. Simpson, Jr., awarding benefits on a miner's claim and denying benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The miner filed a claim for benefits on March 19, 1974, Director's Exhibit 1A, and Cowin & Company, Incorporated (Cowin), having been named as the putative responsible operator, Director's Exhibit 16A, controverted liability on May 8, 1979. Director's Exhibit 17A. The district director,[1] by letter dated September 6, 1979, denied benefits. Director's Exhibit 22A. On September 22, 1979, the miner requested a formal hearing. Director's Exhibit 23A. However, the miner died on September 28, 1982,

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[1] The district director was formerly titled the deputy commissioner. *See* 20 C.F.R. §725.101(a)(11); 55 *Fed. Reg.* 28606 (July 12, 1990).

Director's Exhibit 4B, prior to the date of the hearing. A hearing was held before Administrative Law Judge Edward J. Murty, Jr. on November 18, 1982, Director's Exhibit 41A, culminating in the issuance of an Order of Remand dated February 1, 1983, in which Judge Murty dismissed Cowin as the responsible operator and remanded the case to the district director so that a different operator could be named. Director's Exhibit 44A. On March 3, 1983, the Director appealed the Order of Remand to the Benefits Review Board. Director's Exhibit 45A.

Claimant, the miner's surviving spouse, filed her claim for benefits on May 2, 1983. Director's Exhibit 1B. On May 20, 1983, Mitchell & Neeley, Incorporated (Mitchell or employer), was notified by the district director, that it had been named as the putative responsible operator in the miner's and survivor's claims. Director's Exhibits 11B, 12B. On November 8, 1983, the district director issued a Memorandum of Conference, finding that he did not have jurisdiction over the miner's claim since it was pending with the Board, and that claimant was entitled to benefits on her claim, payable by Cowin. Director's Exhibit 18B. Claimant requested a hearing for a determination as to the disability onset date, Director's Exhibit 19B, and the Black Lung Disability Trust Fund (Trust Fund) began payments pending final disposition of the claim. Director's Exhibit 22B. By letter dated January 17, 1984, the district director noted Cowin's controversion of liability and informed Cowin that both the miner's and survivor's claims would be forwarded to the Board for a decision on the responsible operator issue. Director's Exhibit 24B. On June 28, 1984 the district director notified claimant that her

claim was being referred to the Office of Administrative Law Judges for consideration with the miner's claim for a formal hearing on the entire matter. Director's Exhibit 26B. Prior to any hearing, Administrative Law Judge Ben H. Walley issued an Order of Remand dated November 12, 1985, granting Cowin's Motion for Continuance and remanding the case to the district director, pending the Board's decision of the responsible operator issue in the miner's claim. Director's Exhibit 30B, 36B.

The Board, by Decision and Order dated October 29, 1986, held that Judge Murty erred in finding that the miner had not been exposed to coal mine dust while at Cowin, and therefore, vacated Judge Murty's finding that the miner's employment with Cowin was not as a miner. Consequently, the Board remanded the case to the Office of Administrative Law Judges for reconsideration of that issue. *Gamble v. Cowin and Co., Inc.*, BRB No. 83-571 BLA (Oct. 29, 1986) (unpub.); *see* Director's Exhibit 55A.

On January 19, 1988 Judge Murty issued a Decision and Order finding that, although the miner was employed by Cowin for four years from 1973 through 1976, only four months of that time involved coal mine employment as defined in the Act, Director's Exhibit 60A, and thus, dismissed Cowin as the responsible operator. In light of this, Judge Murty remanded the miner's claim to the district director for further consideration. The district director informed claimant by letter dated February 22, 1988, that the Memorandum of Conference from November 8, 1983 was in error.[2] The district director, therefore, vacated its

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[2] The district director noted the error as follows:

initial finding of entitlement and noted that claimant's case would be reviewed on its merits pursuant to the appropriate regulations. Additionally, the district director dismissed Cowin as the responsible operator pursuant to Judge Murty's Order dated January 19, 1988, and again named Mitchell as the putative responsible operator in both claims. Director's Exhibit 37B. Subsequently, the district director issued a "De Novo Reconsideration," dated March 21, 1988, wherein claimant was found to be entitled to benefits payable by Mitchell.[3] Director's Exhibit 39B.

Employer controverted liability and requested a hearing on April 4, 1988. Director's Exhibits 40B, 41B. A hearing was held on November 7, 1988, before Administrative Law Judge A. A. Simpson, Jr. (the administrative law judge) resulting in the issuance of a Decision and Order dated April 5, 1989. As a preliminary matter, the administrative law judge ini-

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"It appears that a major error was made when the conference decisions of November 8, 1983 were issued. Since your husband's claim was not under the jurisdiction of the deputy commissioner from April 10, 1980 through January 19, 1988, he did *not* have the authority to issue a reconsideration decision in you[r] late husband's claim in 1983. The decision in your claim should have been based upon the 718 Regulations, as amended, and not as a "conversion" from the 727 regulations which are controlling in your husband's claim." Director's Exhibit 37B.

[3] The district director specifically noted that "[t]he evidence in the file indicated that Mr. Gamble was employed by Mitchell and Neely [sic], Inc. in the capacity of a coal miner for more than one year" and that "[s]ince there has been an unappealed judicial determination that Cowin and Company is not the responsible operator, I find that Mitchell and Neely, Inc. must be identified as such." Director's Exhibit 39B.

tially found that, based on the Board's holding in *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), employer must be dismissed as the responsible operator liable for the payment of any benefits awarded on the miner's claim. The administrative law judge, though, found that *Crabtree* would not preclude employer from being the putative responsible operator in the survivor's claim. In considering the survivor's claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis, and consequently, denied benefits on that claim. The administrative law judge, however, concluded that since employer was dismissed as responsible operator in the miner's claim and inasmuch as the Director did not contest claimant's eligibility for benefits, *see* Decision and Order at 8, claimant was derivatively entitled to an award of benefits on the miner's claim to be paid by the Trust Fund. On appeal, the Director contends that the administrative law judge's reliance on *Crabtree* is error, since *Crabtree* was wrongly decided. Alternatively, the Director asserts that assuming *Crabtree* is good law, it is factually distinguishable from the instant case. Employer responds, urging affirmance of the administrative law judge's responsible operator finding.[4]

The Board's scope of review is limited. The administrative law judge's findings of fact and conclusions

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[4] Inasmuch as no party contests the administrative law judge's denial of benefits on the survivor's claim under 20 C.F.R. Part 718, that finding is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

of law must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *OKeeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director specifically contends that the administrative law judge erred in finding employer not liable for benefits as responsible operator in the miner's claim based on *Crabtree*, asserting that the district director's identification of employer as the responsible operator was proper under 20 C.F.R. §725.412(a). The Director further contends that the record shows that a formal hearing was never held on the merits of the miner's claim and that employer had sufficient time to develop evidence and defend against the claim, as demonstrated by employer's submission of evidence into the record. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

In *Crabtree*, we held that due process, as well as administrative efficiency requires the Department of Labor "to resolve the responsible operator issue in a preliminary proceeding and/or proceed against all putative responsible operators at every stage of the claims adjudication." *Crabtree*, 7 BLR at 1-357. We have, subsequently, addressed the applicability of *Crabtree* in two ensuring cases, namely *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991) and *Beckett v. Raven Smokeless Coal Co.*, 14 BLR 1-43 (1990). In each case, we declined to apply *Crabtree*, holding that, since the claim had not been fully litigated on the merits, the concerns presented in *Crabtree* regarding piecemeal litigation were not present therein. Additionally, in both cases, we held

that each employer was not unduly prejudiced by its designation as responsible operator some years after the claim was filed since each employer had a sufficient amount of time in which to develop evidence to defend against the claim for entitlement.[5] *See Lewis*, 15 BLR at 1-41; *Beckett*, 14 BLR at 1-45.

In the instant case we hold that, contrary to the administrative law judge's finding, our holding in *Crabtree* is not applicable.[6] *See Lewis, supra*; *Beckett, supra*. First, we note that the concerns delineated in *Crabtree* regarding piecemeal litigation are not present herein, *see Lewis, supra*; *Beckett, supra*, since employer was named as a responsible operator prior to any formal hearing on the merits.[7] Addition-

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[5] In *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991), the Board found that although the employer had been designated as responsible operator ten years after the filing date of the claim, the employer had two years to develop its case. In *Beckett v. Raven Smokeless Coal Co.*, 14 BLR 1-43 (1990), the Board similarly found that the employer had been designated as responsible operator five years after the filing date of the claim, but still had almost four years to develop its case.

[6] In light of this holding, we decline to address the Director's contention that *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), was incorrectly decided.

[7] Employer was initially notified of its potential liability on the miner's claim on May 20, 1983, *see* Director's Exhibits 11B, 12B, over nine years after the filing date. Although a formal hearing was held on November 18, 1982, prior to employer's notification of its potential liability, the merits of the miner's claim were never addressed in Judge Murty's Order for Remand dated February 1, 1983. Employer, in its response brief, specifically concedes that "[t]he merits of the case were not reached in the administrative law judge's [Judge Murty's] Order due to his determination that Cowin was due to be dismissed as the responsible operator." Employer's Brief at 7.

ally, employer received its procedural due process rights to present evidence, develop its own case and confront and cross-examine the evidence presented on behalf of the miner's claim.[8] *See Richardson v. Perales*, 402 U.S. 389, 405 (1971). Employer, therefore, was not unduly prejudiced by its designation as responsible operator in the miner's claim. We, therefore, reverse the administrative law judge's finding that employer is not the responsible operator in the miner's claim.

We must now address employer's contention that the administrative law judge failed to give employer the opportunity to defend against the miner's claim. Employer's Brief at 6. The administrative law judge awarded benefits on the miner's claim after finding that "the director has not contested entitlement." Decision and Order at 8. Thus, in reversing the ad-

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Likewise, the Board's October 29, 1986, opinion and Judge Murty's subsequent Decision and Order dated January 19, 1988, do not address the merits of the miner's claim. The sole issue considered in each instance pertained to whether Cowin had been correctly named as responsible operator in the miner's claim. The miner's claim, therefore, had not been fully litigated prior to the time employer entered the case and specifically controverted its liability.

[8] Specifically, employer participated in the second hearing held on November 7, 1988, before Judge Simpson. Although employer contested its involvement in the miner's claim as responsible operator, Hearing Transcript at 6, employer acknowledged that the hearing concerned the litigation of both claims. Hearing Transcript at 5. At the hearing employer had an ample opportunity to submit evidence necessary to defend against its possible liability for benefits on the miner's claim, as evidenced by the fact that it submitted three re-readings of x-rays as well as the deposition of Dr. Goldstein, who had examined the miner on May 23, 1979. *See* Employer's Exhibits 1-4.

ministrative law judge's responsible operator finding on the miner's claim, we must remand the case for consideration of the miner's claim on the merits, particularly in light of the fact that employer controverted all relevant issues.[9] *See* Director's Exhibit 40B. As the miner's claim was originally filed on March 19, 1974, the administrative law judge must consider whether entitlement can be established pursuant to 20 C.F.R. Part 727. Additionally, if, on remand, the administrative law judge finds no entitlement on the miner's claim under Part 727, claimant is entitled to have that claim considered pursuant to 20 C.F.R. Part 718. *See Terry v. Director, OWCP*, 956 F.2d 251, 16 BLR 2-67 (11th Cir. 1992). Lastly, we note that if entitlement is established on the miner's claim under either Part 727 or Part 718, claimant is derivatively entitled to benefits. *See* 20 C.F.R. §725.212(a)(3)(ii); *see generally Deloe v. Director, OWCP*, 16 BLR 1-9 (1991).

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[9] Employer asserts that by remanding the case, claimant will be prejudiced, since if, on remand, employer is successful in defending against the miner's claim, claimant will lose her entitlement. Contrary to employer's concern, claimant would not be unduly prejudiced, "since claimant never had to defend entitlement against" the previously named responsible operator, Cowin, *see Beckett*, 14 BLR at 1-45, because the miner's claim has never been adjudicated on the merits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

/s/ BETTY J. STAGE
BETTY J. STAGE, Chief
Administrative
Appeals Judge

/s/ ROY P. SMITH
ROY P. SMITH
Administrative
Appeals Judge

/s/ NANCY S. DOLDER
NANCY S. DOLDER
Administrative
Appeals Judge